

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 20, 2002

STATE OF TENNESSEE v. RICHARD L. PARKER

Appeal from the Criminal Court for Sullivan County
No. S44,328 R. Jerry Beck, Judge

No. E2001-00930-CCA-R3-CD
August 29, 2002

The defendant, Richard L. Parker, was indicted for aggravated assault, Class D felony evading arrest, violation of the open container law, speeding, driving under the influence, third offense, and driving on a revoked or suspended license. See Tenn. Code Ann. §§ 39-13-102, 39-16-603, 55-10-416, 55-8-152, 55-10-401, 55-50-504. Because the aggravated assault allegedly occurred in Washington County, that charge was dismissed by the state. The defendant pled guilty to the remaining offenses. The trial court imposed concurrent, Range I sentences of four years for evading arrest, 30 days for violation of the open container law, 30 days for speeding, and six months for driving on a revoked or suspended license. For the third-offense DUI, the trial court imposed a Range I sentence of 11 months, 29 days to be served consecutively. In this appeal of right, the defendant contends that the trial court erred by denying an alternative sentence for the evading arrest conviction. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Julie A. Rice, Knoxville, Tennessee (on appeal), and Terry L. Jordan, Assistant Public Defender (at trial), for the appellant, Richard L. Parker.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The state and the defendant stipulated the facts as follows:

On August the 24th of 2000, at approximately eight o'clock . . . in the evening, Trooper Paul Mooneyham of the Tennessee Highway Patrol clocked the defendant's

1969 Chevrolet pick-up truck traveling north on Interstate 81 at ninety-five . . . miles an hour in a seventy . . . mile per hour zone.

Trooper Mooneyham was . . . going in the opposite direction [i]n . . . the opposite lanes of travel. He pulled down into the median [and] activated his emergency lights. The defendant failed to slow, but, in fact, increased his speed, which prompted Trooper Mooneyham to pull onto the Interstate and to follow the defendant at very high rates of speed, all the time while running his emergency equipment.

The defendant, at no time, slowed down. The defendant got to the interchange of 181, took a right, started traveling south on 181, heading towards Washington County. The method that the defendant was driving, as well as the excessive rates of speed, endangered a number of other individuals that were out on the Interstate traveling, both in the lane of travel going in his direction as well as the opposite lanes of travel.

The defendant . . . eventually entered . . . Washington County[, where] he turned down . . . onto Copas Road, which was a dead-end road. At the end of the dead-end, Trooper Mooneyham and the defendant's vehicles were facing one another at which time the defendant drove his vehicle into Trooper Mooneyham's vehicle, prompting Trooper Mooneyham to discharge one round into the cab of the pick-up truck.

At that point in time, the defendant was taken into custody. . . . [A] search of the cab of the pick-up truck revealed . . . cold beers [and an] open bottle . . . of Seagrams alcohol. The defendant was under the influence of alcohol. Trooper Mooneyham made the observations based on the defendant's breath, as well as his facial features and others. . . . The defendant was arrested. He was subsequently taken for purposes of drawing blood from him The defendant agreed, after being advised of the rights and responsibilities of the Implied Consent Law. A blood sample . . . was sent to the Tennessee Bureau of Investigation Crime Laboratory where it proved positive for a .17 blood alcohol level.

The defendant, after being advised of his constitutional rights per the Miranda decision, admitted that he did not have a license. That he had lost it. He was a habitual offender in Virginia. That he had continued to drive. He did not know how fast he was going since his speedometer didn't work, but he admitted that he was driving fast and that he was fleeing from the [o]fficer because of his license status.

The defendant acknowledged having driven in excess of 100 miles per hour while being pursued by Trooper Mooneyham. He admitted that he had consumed a couple of beers and had

drunk Seagram's liquor prior to the arrest. The presentence report contains the following statement made by the defendant, age 41:

I was depressed about being away from my children, [who] are living in Winchester, Va. I was drinking, decided to go back and live closer to them, when police tried to pull over I got scared and tried to evade. I plan to stop drinking and driving. . . . I want to and will be married upon my release. I want to take care of my responsibilities and also build my own home. . . . I'm going to be considered a Range 2 or career criminal and I never in my life thought this could happen to me. A death in my family, bankruptcy, home foreclosure, divorce and driver's license taken for 10 years. This all happened in 1989, by 1990 I was doing time. It's time to let go of the past and look toward the future.

The presentence report also established a significant number of prior convictions:

<u>DATE</u>	<u>OFFENSE</u>	<u>SENTENCE</u>
04/13/98	DUI (TN)	11 months, 29 days, susp.
06/04/98	disorderly conduct (MD)	60 days
05/01/97	burglary (other than habitation) (MD)	3 years, susp.
03/11/94	resisting arrest	1 year, 10 months, effective
1994	disorderly conduct	
	breaking and entering (MD)	
	destruction of property	
11/08/90	resist stop and frisk (VA)	6 months, susp.
	escape (VA)	12 months, susp.
08/30/90	habitual offender	suspended driver's license
08/07/90	DUI	90 days
	refusal breath test	
	driving on suspended	
04/23/86	attempt to elude police	fine and costs
03/17/78	reckless driving (reduced from DUI)	fine and costs

The defendant was initially placed on probation for the 1997 burglary conviction. His probation was revoked in 1998, however, after he was arrested for disorderly conduct and cited by his probation officer for failure to report, moving without permission, failure to pay court costs and fees, drinking, and failure to successfully complete an alcohol treatment program. When the defendant was later released on parole, he absconded to Pennsylvania, where he was arrested for DUI, a charge that was still pending at the time of imposition of the sentence at issue. The defendant was also placed on probation in this state for the 1998 DUI. At the time of sentencing, a probation violation warrant was pending based on the defendant's failure to report and failure to pay fees.

The defendant dropped out of high school during the ninth grade because he “didn’t like” it. Although he claimed that he earned his GED in Maryland in 1995, he was unable to produce documentation. According to the defendant, he first tried alcohol at the age of 15. He acknowledged an alcohol addiction and contended that he participated in Alcoholics Anonymous as a condition of his probation in 1997. The defendant reported that he first used marijuana at the age of 16 and continued the practice four to five times per week until the age of 30, when he began drinking heavily. The defendant married in 1979, had four children, and separated from his wife in 1990. Although he was to pay \$300 per month child support, he had not made a payment in five years. The defendant was employed as a production worker at O’Sullivan’s Corporation in Virginia from June of 1984 to March of 1988 and was a carpenter at Towne & Country Properties in Sevierville for approximately three months in 2000. Although the defendant claimed that he had worked as a carpenter in Maryland and Virginia, that information could not be verified by the officer who prepared the presentence report.

The defendant, who was incarcerated at the time of the sentencing hearing, testified that all of his prior offenses, including the burglary, involved alcohol. He stated that he had previously undergone eight months of counseling, but was charged with disorderly conduct, and had started drinking again. The defendant asked the trial court for an opportunity “to get [his] life back on track and address [his] alcohol problem.” He submitted that he had “come very close to quitting before [and had] even placed [himself] on Antabuse to quit drinking.” The defendant promised that if he were released, he would reside with his girlfriend in Newport and find work as a carpenter.

The trial court denied alternative sentencing without explanation. In this appeal, the defendant asserts that he should have been sentenced to inpatient treatment, community corrections, or a halfway house. The state contends that incarceration is necessary to avoid depreciating the seriousness of the offense and argues that the defendant has failed to comply with less restrictive measures.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). “If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls.” State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the

defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are, of course, presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b) (Supp. 2000).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). The nature and circumstances of the offenses may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983).

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn.1990). Even in cases where the defendant meets the minimum requirements of the Community Corrections Act of 1985, the defendant is not necessarily entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App.1987). The following offenders are eligible for Community Corrections:

(1) Persons who, without this option, would be incarcerated in a correctional institution;

(2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;

(3) Persons who are convicted of nonviolent felony offenses;

(4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(6) Persons who do not demonstrate a pattern of committing violent offenses;

and

Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

In Ashby, our supreme court encouraged the grant of considerable discretionary authority to our trial courts in matters such as these. 823 S.W.2d at 171; see also State v. Moss, 727 S.W.2d 229, 235 (Tenn.1986). "[E]ach case must be bottomed upon its own facts." Taylor, 744 S.W.2d at 922. "It is not the policy or purpose of this court to place trial judges in a judicial straight-jacket in this or any other area, and we are always reluctant to interfere with their traditional discretionary powers." Ashby, 823 S.W.2d at 171.

In our view, the trial court did not abuse its discretion by denying an alternative sentence. Although the record supports the defendant's claim that he suffers from an alcohol addiction and would likely benefit from treatment, the record also reflects that the defendant has failed to take advantage of several opportunities at rehabilitation. In two previous sentences, he failed to comply with probationary terms, including an order that he complete an alcohol treatment program. He continues to refuse to accept full responsibility for his drinking problem. In short, the defendant's social history, his prior criminal record, and his inability to comply with probationary terms suggests a lack of amenability to rehabilitation.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE